
CANADA / JUDGMENT

R. v. Dyck

2015 BCSC 1937

COURT

Supreme Court of British Columbia

DECIDED

8 September 2015

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2015 BCSC 1937 R. v. Dyck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dyck,

2015 BCSC 1937

Date: 20150908

Docket: 98231-2

Registry: Kamloops

Regina

v.

Jason Lee Dyck and Jason Aran Martin

Before: The Honourable Madam Justice Donegan

Oral Reasons for Sentence

Re Accused Jason Aran Martin

Counsel for the Crown:

T.A. Livingston

Counsel for the Accused Martin:

J.J. Allingham

Place and Date of Sentencing Hearing:

Kamloops, B.C.

September 8, 2015

Place and Date of Judgment:

Kamloops, B.C.

September 8, 2015

- [1] THE COURT: Jason Aran Martin has been convicted, following a trial, of both counts on this Indictment 98231-2. Both counsel agree that, pursuant to the principles expressed in *R. v. Kienapple*, [1975] 1 S.C.R. 729, I ought to enter a conditional stay of proceedings in respect of Count 1 and sentence Mr. Martin on Count 2. I agree.

CIRCUMSTANCES OF THE OFFENCE

- [2] As I gave extensive oral reasons for conviction not long ago, I will not repeat the circumstances of the offence in detail. By way of summary, mere hours after having been sentenced to a two-year-less-a-day conditional sentence order in the Lower Mainland of British Columbia, Mr. Martin travelled back to Kamloops and, together with others, broke into a rural property owned by an elderly man by the name of Edson Joyce and his spouse. Wearing gloves and using a pry bar, Mr. Martin broke open the front gate of this property, and all the offenders broke into the buildings on the property and stole a number of items belonging to Mr. Joyce and his spouse.
- [3] From their trailer was taken, among other things, a television and a gun storage case containing two guns together with ammunition. Their trailer, which has been described as their sanctuary, their getaway on this rural property, was, for lack of a better term, trashed.
- [4] From one of the large storage containers on the property was taken two all-terrain vehicles. From a security camera at the point of entry, that is the gate, Mr. Martin was identified by police. He was arrested soon after. While Mr. Martin admitted that he was there, admitted that it was him in the photographs, and took police to the location where the ATVs had been hidden, Mr. Martin did not admit his involvement in the crime. The guns were never recovered.
- [5] Mr. Martin testified at his trial. As my reasons disclosed, his evidence was completely rejected, nor did it raise any reasonable doubt.

VICTIM IMPACT

- [6] I have the benefit of a five-page written victim impact statement from Mr. Joyce. I will not read it into the record, but I have read it in full. Suffice it to say that, although there has been a financial impact upon Mr. Joyce and his spouse, it pales in comparison to the significance of the emotional impact upon him. He describes a profoundly negative impact on his peace of mind and the safety of his rural property. There can be no question that it has had a significant impact on this elderly man and his spouse.

CIRCUMSTANCES OF THE OFFENDER

- [7] I have the benefit of a great deal of information about Mr. Martin. I have his counsel's thorough submissions. I have a number of letters that have been tendered on his behalf, including a letter from an addictions counsellor which I have read in full, a letter from the chaplain at KRCC, Mr. Heigh, a very well-written letter from his girlfriend, Ms. Towhey, a two-page letter expressing her support for Mr. Martin, and a letter from a long-time friend, I suppose is a fair way to describe Ms. De Winter, again supporting Mr. Martin.
- [8] Marked as Exhibit 1 in these proceedings is Mr. Martin's record for criminal convictions. Finally, I have information from Mr. Martin himself who, I agree with his counsel, is a fairly articulate and well-spoken individual.
- [9] From all of this material, I have learned that Mr. Martin is 40 years old. He has two children in their teens who, I think it is fair to say, as a result of Mr. Martin's lifelong criminality, do not have as much of a relationship with their father as Mr. Martin would hope. He has expressed embarrassment at his conduct and how he has, to use his words, "not been a good role model". I do accept that this is a source of regret for Mr. Martin.
- [10] Mr. Martin has 52 prior convictions. His convictions commence in 1993 and run largely unbroken to today. Of those prior convictions, 16 relate to property offences. Of course, I will not read in all of the convictions, but there are several that are noteworthy. Beginning in 1993, Mr. Martin was sentenced for break and enter and theft in Youth Court. He received probation for 12 months. Then -- and again, I am just pulling out relevant highlights -- in 1995, in Rossland, British Columbia, among other offences, Mr. Martin was sentenced for a break and enter where he received eight months' imprisonment followed by probation for two years. In 2001, in Vernon, in addition to another conviction, Mr. Martin was convicted for robbery. He received a sentence of 15 months' imprisonment, followed by probation for 18 months.
- [11] Then skipping ahead through many convictions to March 18, 2009, Mr. Martin was convicted of possession of property obtained by crime over \$5,000. He received a 30-day sentence. He was also convicted of another count of possession of property obtained by crime, this time under \$5,000, where he received a consecutive 30-day sentence. The record reflects that he had served four months of pre-sentence custody.
- [12] On April 2, 2009, Mr. Martin was convicted of robbery here in Kamloops where he received a sentence of three years imprisonment and also was the subject of a mandatory firearms prohibition order pursuant to s. 109 of the Criminal Code.
- [13] Skipping ahead through several convictions, on March 24, 2014, in Kamloops, Mr. Martin was convicted of possessing a prohibited weapon without a licence, and possession of a firearm contrary to order. He received a jail sentence of 141 days, and that gave him credit for time in custody. The sentence would have been 180 days if not for his pre-trial custody. He was again given a mandatory lifetime firearms prohibition.

- [14] Of most recent significance, on August 8, 2014, in Surrey, British Columbia, Mr. Martin was convicted of possession of stolen property. He received a conditional sentence order of two-years-less-a-day, followed by a one-year probation order.
- [15] Mr. Martin has been in custody now since August 9, 2014. With respect to the last conviction, I am told that Mr. Martin, while in custody since August 9, 2014, was not detained with respect to the conditional sentence order matter until October 6, 2014. I am told that this morning, following a breach of his conditional sentence order hearing last May, Mr. Martin had his conditional sentence order terminated by a Provincial Court judge. He now has approximately 13 months' incarceration remaining to serve on that sentence.
- [16] Both counsel agree, or at least the Crown submits and the defence has not taken a contrary position, that Mr. Martin is entitled to credit for time in custody on this matter from August 9 to October 6, 2014. This is 58 days. Credited at a rate of 1.5 to one, Mr. Martin is entitled to 87 days' credit with respect to the case at bar.
- [17] I have also learned, through Mr. Martin's materials, that while he has been in custody the last 13 months, he has taken some steps toward rehabilitation. These steps are set out in the letters that I have referenced, and as well as through his counsel's submissions and Mr. Martin's remarks. Mr. Martin has, as I have indicated, a supportive girlfriend who understands his offending, understands his drug addiction, and what perhaps motivates some of his behaviour. He does have the support of others as set out in the letters.
- [18] Mr. Martin achieved his Grade 12 education while in custody not that long ago. This is a very good thing. He does have a work history, although I have not been given much in the way of specifics. I am told that he expects work available when he is eventually released from custody.
- [19] Mr. Martin made some attempts in the past towards rehabilitation. He was in a treatment program prior to the imposition of the recent conditional sentence order. I am told that he successfully completed that treatment program and it played a role in the conditional sentence order he received. He expects, upon his release from custody, that he would renew those efforts. He had his counsel speak to representatives at the treatment centre in Kamloops called the New Life Mission.
- [20] Mr. Martin frankly and fairly acknowledges that in the circumstances of his history, the court should have some skepticism when he claims to be a changed man, but he nonetheless claims to be. He does appear to have taken some initial steps towards changes while he has been in custody.

LEGAL PARAMETERS

- [21] This offence carries with it a maximum term of imprisonment of life imprisonment. To my mind, this demonstrates the seriousness with which Parliament views this offence. Stolen, unauthorized firearms in the hands of those who would steal them is of grave concern to our society as a whole.

POSITION OF THE PARTIES

- [22] The Crown submits that a four-year jail sentence would be appropriate in all of the circumstances and has provided a case book with authorities to that effect. Mr. Livingston submits that when I consider the totality principle, as I must, that a three-year sentence consecutive to the time that Mr. Martin is currently serving in custody is appropriate. In addition, the Crown seeks another lifetime firearms prohibition and a DNA order, as well as forfeiture of exhibits.
- [23] In respect of the authorities that have been provided, I recognize that each is unique on its facts, but these authorities do provide some guidance in terms of appropriate range of sentence and the principles to be emphasized.
- [24] In terms of the defence position, counsel for Mr. Martin submits that while denunciation, deterrence, and separation from society are important in the circumstances of this case, the court cannot lose sight of Mr. Martin's ability and prospects toward rehabilitation. In that light, he emphasizes Mr. Martin's post-offence rehabilitation efforts. He also emphasizes Mr. Martin's cooperation with the police at the outset in taking them to the location of the hidden all-terrain vehicles.
- [25] Mr. Martin submits that 12 months' incarceration is the appropriate sentence. He asks that this sentence be served concurrently to the sentence he is currently serving. No case authorities have been provided to support that position.

ANALYSIS

- [26] Turning to the principles of sentencing. As both counsel have urged and stressed, I must consider the principles of sentencing as set out in ss. 718, 718.1, and 718.2 of the Criminal Code.
- [27] Section 718 sets out the fundamental purpose of sentencing, as well as the objectives to be achieved. These objectives include denunciation, general and specific deterrence, separation of offenders from society where necessary, rehabilitation, to provide reparations for harm done to victims, and to promote a sense of responsibility in offenders and acknowledgment of harm done to victims and the community.
- [28] Section 718.1 sets out the principle of proportionality; that is, that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [29] Section 718.2 sets out the principles that a court must consider when crafting an appropriate sentence. These include any aggravating and mitigating circumstances relating to the offence or the offender; that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; that an offender should not be deprived of liberty if less-restrictive sanctions may be appropriate in the circumstances; and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. Mr. Martin is not an Aboriginal offender.
- [30] In terms of the mitigating factors, Mr. Martin did express a limited indication of remorse when arrested. He took police to the location where he and others had hidden Mr. Joyce's all-terrain vehicles. This remorse, although I do take it into account as a mitigating factor, is tempered somewhat by two factors. First, Mr. Martin was effectively caught red-handed by the security camera and made up what can only be described as a rather preposterous story to try and explain the images away. I do question whether his remorse is true remorse in those circumstances. However, I do give him some credit because Mr. Joyce was able to recover some of his stolen property which was significant to him. Second, I also find Mr. Martin's remorse to be tempered somewhat by the fact that the firearms have never been recovered.
- [31] I also take into account in mitigation the beginning steps that Mr. Martin has taken toward rehabilitation while in custody. As well, he also has some support in the community and I do not lose sight of that.
- [32] Turning to the aggravating factors. Of course, the circumstances of the offence are serious. Firearms were stolen from this location and they have never been recovered. The trailer where Mr. Joyce and his spouse stayed from time to time was trashed. It is also aggravating that Mr. Martin received the benefit of a two-year less a day conditional sentence order for possession of stolen property less than 24 hours before committing this offence which, to my mind, shows a complete and utter disregard for court orders. It tells me that everything said by Mr. Martin in that sentencing hearing to convince that judge that serving a conditional sentence order would not endanger the public was either untrue at worst, or hopelessly naïve at best.
- [33] It is well known that sentencing is an individualized process. I am to craft a sentence that balances Mr. Martin's circumstances and his interest and prospects in rehabilitation with the community's interest in deterrence, denunciation, and protection, all in accordance with the principles of sentencing that I have outlined. It is not an easy task.

- [34] A jail term here is clearly warranted. Both counsel agree. Whether sentences for multiple offences are made consecutive or concurrent, it is my task to fix an appropriate global sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender. The importance of this balancing exercise is reflected in the principle of proportionality that I have already outlined and referred to in s. 718.1 of the Code, and also recently affirmed by our Court of Appeal in *R. v. Li*, 2009 BCCA 85 at para. 26:
- [26] Whether sentences for multiple offences are made consecutive or concurrent, it is the task of the sentencing judge to fix an appropriate global sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender. The importance of this balancing is reflected in the principle of proportionality, which has been codified in s. 718.1 of the Criminal Code under the heading "fundamental principle":

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [35] I first have to look at the appropriate sentence. As I have said, this offence is very serious. Denunciation and deterrence are paramount sentencing objectives, in my view, in the circumstances of this case. Although Mr. Martin has had many chances and been given many opportunities toward rehabilitation over the years, I agree with his counsel when he says that Mr. Martin is not beyond hope. He is again working toward improving himself while in custody, and attempting to overcome his addictions and other difficulties, so I do not lose sight of rehabilitation as an objective here as well.
- [36] Balancing all of the factors I have outlined, in line with the purpose and objectives of sentencing, I conclude that four years' incarceration for this offence would be a fit and proper sentence. This is before considering totality.
- [37] The next question for me is whether the sentence ought to be served consecutively or concurrently to the sentence he is currently serving, meaning his conditional sentence order that has been terminated. No meaningful submissions were made in favour of a concurrent sentence here, nor could any be made. Mr. Martin was sentenced for an entirely different matter, as a result of this entirely different offence. His conditional sentence order was terminated and he is required to serve the balance in custody which is, I am told, 13 months.
- [38] This is a case where the court has to be concerned with denunciation and deterrence. If the sentence in the case at bar were to be served concurrently to the sentence Mr. Martin is currently serving, those principles would not and could not be met. The sentence must be, in my opinion, served consecutively.
- [39] Since I have determined that consecutive time is required, I turn to the second step, to determine whether the aggregate of the two sentences offends the totality principle. The Crown submits that it does and the sentence ought to be reduced for this matter to three years, to reflect the totality principle. When I consider the two sentences as a whole, the one

imposed this morning by the Provincial Court judge and the sentence I am to impose today, I am persuaded, in the circumstances of this case, that it would be unduly disproportionate. I, therefore, impose a sentence of three years' imprisonment with respect to Count 2 of this matter. This three-year sentence is to be served consecutively to the sentence Mr. Martin is currently serving.

[40] From this three-year sentence, I do give Mr. Martin credit for pre-trial custody in the total amount of 87 days.

[41] In terms of ancillary orders, Mr. Martin is prohibited from possessing firearms and the like, as set out in s. 109 of the Criminal Code, for life.

[42] As a secondary designated offence, I find it appropriate that Mr. Martin provide a sample of his DNA to the DNA Data Bank, pursuant to s. 487.051 of the Criminal Code.

[43] I do make an order with respect to the exhibits as set out in Exhibit 7 in respect of Mr. Martin only. The exhibits outlined will be forfeited to the Crown. There will still be a hearing with respect to the exhibits in respect of the co-accused.

[44] Anything I have overlooked, gentlemen, or anything further?

[45] MR. LIVINGSTON: No, My Lady.

[46] MR. ALLINGHAM: No, I just take it the aggravating factors, everything set out at his CSO hearing was either untrue -- I made the submissions at the hearing. I don't take it that you're saying counsel made submissions in that respect, but anything Mr. Martin had stated in that regard.

[47] THE COURT: I am sorry, say that again?

[48] MR. ALLINGHAM: Oh sorry, just when you were listing aggravating factors, it's a minor point. You said everything Mr. Martin must have said there was either untrue or naïve.

[49] THE COURT: Oh, I see.

[50] MR. ALLINGHAM: I was counsel that made the submissions and I just --

[51] THE COURT: There was --

[52] MR. ALLINGHAM: I know you probably weren't saying that, but --

[53] THE COURT: I have absolutely nothing negative to say anything toward counsel whatsoever. Counsel make submissions on their clients' behalf. My remarks in that regard were directed to Mr. Martin and Mr. Martin only.

[54] MR. ALLINGHAM: Thank you.

[55] THE COURT: Yes. Thank you.

[56] MR. LIVINGSTON: Thank you, My Lady.

"S.A. Donegan J."

DONEGAN J.

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